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Nos. 81-2147 and 81-2188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL.,

Petitioners,

vs.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.,

Respondents.

STATE OF MONTANA, ET AL.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF NEW MEXICO AS AMICUS CURIAE IN SUPPORT OF WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 18, 1982

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INTEREST OF THE AMICUS CURIAE

All water rights in the western states originate under either state or federal law. The uniform administration of state and federal water rights requires the adjudication of all water right

claims in a single proceeding. Without the adjudication and the administration of water rights under court decrees, water cannot be properly allocated in times of shortage and the overappropriation or depletion of limited water resources may result.

There are ten water rights adjudication suits pending in New Mexico, four suits in state court and six suits in federal court. Three of the state suits involve the adjudication of federal water rights for five Indian tribes. Over 2,900 individual water right claims have been adjudicated in these three suits. The holding of the Ninth Circuit Court of Appeals would result in the dismissal of these suits for lack of jurisdiction over the subject matter, even though the United States and four of the Indian tribes have appeared and participated as parties to the suits pursuant to final jurisdictional orders in *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976); *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979), *cert. denied*, 444 U.S. 995 (1979); and *State of New Mexico v. United States*, San Juan County Cause No. 75-184.

SUMMARY OF ARGUMENT

Even if the state constitutional disclaimer provisions prohibit the adjudication of federal water rights in state courts, the repeal of those provisions is not required by section 6 of Public Law 280 in order for state courts to assume jurisdiction under the McCarran Amendment. The constitutional disclaimer provisions adopted pursuant to state enabling acts constitute compacts between the states and the United States. The McCarran Amendment unilaterally waived any constitutional disclaimer provision that may have prohibited the adjudication of federal water rights in state court. The waiver is effective even though the disclaimer provision was not repealed by the state.

ARGUMENT

THE McCARRAN AMENDMENT UNILATERALLY WAIVED ANY STATE CONSTITUTIONAL COMPACT RESTRICTION ON THE JURISDICTION OF STATE COURTS TO ADJUDICATE FEDERAL WATER RIGHTS.

Eleven western states have constitutional provisions that (1) disclaim "all right and title" to the unappropriated public lands and all lands held by any Indian or Indian tribes and (2) acknowledge that Indian lands shall remain under the "absolute jurisdiction and control" of the of the United States Congress.[1] These provisions were adopted pursuant to acts of Congress that enabled the territories to be admitted into the Union. The constitutions incorporate these provisions as part of an "Ordinance" or "Compact with the United States" which is irrevocable without the consent of the United States.[2] In the "McCarran Amendment," Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. §666 (1976), Congress consented to the joinder of the United States as a defendant in "any suit" for the adjudication of water rights in a stream system.

The Ninth Circuit Court of Appeals considered whether the McCarran Amendment could be "read to amend" the state constitutional provisions that acknowledge the absolute jurisdiction and control of Congress over Indian lands. (Ariz.

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[1]Alaska, Art. 12 §12, refers to "absolute disposition" rather than jurisdiction; Arizona, Art. 20 para. 4; Idaho, Art. 21 §19; Montana, Art. 1; New Mexico, Art. 21 §2; North Dakota, Art. 13 §2; Oklahoma, Art. 1 §3, omits the word "absolute"; South Dakota, Art. 22 §2; Utah, Art. 3 para. 2; Washington, Art. 26 §2; and Wyoming, Art. 21 §26.

[2]In the Montana, New Mexico, North Dakota, South Dakota and Washington constitutions the articles are captioned "Compact with the United States." *Van Brocklin v. Tennessee*, 117 U.S. 151, 167, (1886), refers to the "compacts by which new States have been admitted into the Union."

App. C at 5.) It held that it could not. The court reasoned that the valid exercise of state jurisdiction requires both personal and subject matter jurisdiction. The court stated that the McCarran Amendment waived only personal jurisdiction over the United States. It asserted that state constitutional provisions on jurisdiction had to be "validly repealed" before the state courts could assume jurisdiction to adjudicate federal water rights and in order for the repeal to be valid it must be "within the requirements of the federal law," i.e. "Public Law 280," Act of August 15, 1953, 67 Stat. 588, 25 U.S.C. §1324 (1976). (Ariz. App. C at 8 and App. A at 9.) The court held that Congress had established in section 6 of Public Law 280 the requirement that state constitutional disclaimer provisions must be repealed under state law before a state may exercise jurisdiction to adjudicate federal water rights for Indian tribes. This decision was based upon the "crucial" distinction between disclaimer and non-disclaimer states in Public Law 280. (Ariz. App. C at 9.)

The Ninth Circuit relied upon the interpretation of Public Law 280 in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). In that case Washington had enacted a statute obligating the state to assume partial civil and criminal jurisdiction over Indian lands in accordance with Public Law 280. The Yakima Indian Nation challenged the statute claiming that section 6 of Public Law 280 required Washington to amend the disclaimer provision in its constitution before it could assume jurisdiction over Indian lands. The Supreme Court found that section 6 was designed to remove an obstacle to state jurisdiction, not to create one. *Id.* at 491. Any enabling act provision that required a constitutional amendment was "effectively repealed" by section 6. *Id.* at 493. The Court held that section 6 did not impose the requirement of a constitutional amendment as a condition precedent to the valid assumption of jurisdiction by disclaimer states. *Id.* at 485. If, however, a constitutional amendment is required as a matter of state law, independent of

any enabling act provision, then that procedure should be followed. *Id.* at 493. *Washington v. Yakima Indian Nation* does not support the Ninth Circuit's reliance upon the "crucial" distinction between disclaimer and non-disclaimer states. The Supreme Court did not recognize such a distinction in determining whether there was compliance with the procedural requirements for the transfer of jurisdiction under Public Law 280.

Since the state constitutional disclaimer provisions were adopted pursuant to the enabling acts and constitute provisions in compacts with the United States, the substantive law of contracts should apply. Under the common law a party to a written contract may voluntarily waive any provision in the contract which has been established for its benefit. *Swain v. Seamens*, 76 U.S. (9 Wall.) 254, 271 (1869). The waiver of the contract provision is a unilateral act and does not depend upon consideration or estoppel to be effective. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d. 782, 788 (1972); *Peterson v. United States Building Maintenance Co.*, 96 Ill. App. 2d 398, 239 N.E.2d 322, 324 (1968); 5 S. Williston, *Law of Contracts* §678 at 239-40 (3d ed. 1961). Waiver applies even if the parties to the contract have stipulated in the contract that it can be changed or modified in only one specific way. *Zurich General Accident & Liability Ins. Co. v. Baum*, 159 Va. 404, 165, S.E. 518, 519 (1932).

The McCarran Amendment was a unilateral waiver of not just sovereign immunity but also any compact provision in the state constitutions that may disclaim jurisdiction to adjudicate federal water rights in state courts. The unilateral waiver did not require a repeal of the state constitutional compact provisions in the state constitution in order to be effective. The waiver is effective even if the compact provisions expressly required repeal in a specific way.

CONCLUSION

If the McCarran Amendment is a unilateral waiver of the state constitutional disclaimer provisions that is effective without the repeal of those provisions, then the Ninth Circuit is correct when it stated that *Jicarilla Apache Tribe v. United States, supra,* "went too far by relying on the distinction between proprietary and governmental functions." (Ariz. App. C at 11.) The Ninth Circuit, however, went too far in relying upon a doubtful distinction between disclaimer and non-disclaimer states in Public Law 280 as a basis for finding a congressional intent to restrict the unilateral waiver of jurisdiction in the McCarran Amendment.

The amicus curiae State of New Mexico requests the Court to reverse the holding of the Ninth Circuit on the disclaimer issue.

Respectfully submitted,

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